

# The Burger Court Opinion Writing Database

## *Board of School Commissioners of Indianapolis v. Jacobs*

420 U.S. 128 (1975)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

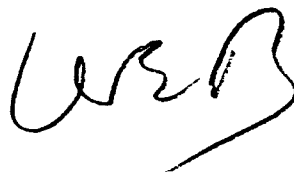
December 17, 1974

Re: 73-1347 - Bd. of School Commissioners of City of  
Indianapolis v. Jacobs

MEMORANDUM TO THE CONFERENCE:

I vote to vacate and remand with directions that the  
judgment be vacated and the complaint dismissed.

Regards,

A handwritten signature in dark ink, appearing to be "W. E. B.", written in a cursive style.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

December 23, 1974

MEMORANDUM TO THE CONFERENCE:

The current assignment list is enclosed.

Four cases remain unassigned for varying reasons.  
The final assignments will adjust any imbalances.

Merry Christmas!



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P. S. -- On 73-1347 - Bd. of School Commrs. of City of Indianapolis v. Jacobs I have now voted to vacate and remand on the Munsingwear formula, so it appears there may be a potential majority for that course. The decision on handling will be left to Byron to whom it is assigned.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

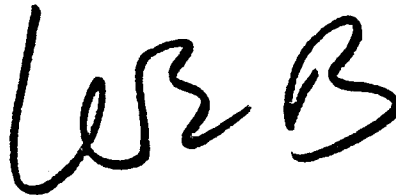
February 12, 1975

Re: 73-1347 - Board of School Commissioners of  
City of Indianapolis v. Jacobs

Dear Byron:

I join the proposed per curiam dated  
February 3, 1975.

Regards,

A handwritten signature in black ink, appearing to read 'W E B', which is the signature of Warren E. Burger.

Mr. Justice White

Copies to the Conference

Board of School Commissioners v. Jacobs

To : The Chief Justice  
Mr. Justice  
Mr. Justice St.  
Mr. Justice White  
73-1347  
Mr. Justice Black  
Mr. Justice Powell  
Mr. Justice Rehnquist

Mr. Justice Douglas, dissenting.

From: Douglas; J.

In Sosna v. Iowa, \_\_\_ U.S. \_\_\_ (1974), we found no mootness problem where a named plaintiff had satisfied the durational residence requirement which she sought to attack. Our holding to that effect was based upon three factors which we found present in that case: (1) a certification of the suit as a class action; (2) a continuing injury suffered by other members of the class; and (3) a time factor which made it highly probable that any single individual would find his claim inevitably mooted before the full course of litigation had been run. Applying those principles to the present case, I would hold that an Art. III controversy exists and that the parties are therefore entitled to a ruling on the merits.

This suit was instituted as a class action on behalf of all high school students attending Indianapolis public schools. The limited record presented to us by the parties does not provide any direct indication of whether the class in question was ever certified as required by Rule 23(c)(1), F.R.Civ.Pro. At oral argument, however, counsel for the Board of School Commissioners stated, in ~~an~~ response to a question from the bench, that there had been a declaration of certification of class action (Tr., p. 11). That statement finds circumstantial support in both opinions below: the Court of Appeals adverts at one point to the issue of whether "plaintiffs or class members" would be bound by the judgment, 490 F.2d, ~~601~~ at 603, while the district court had earlier stated expressly that the two named

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

January 29, 1975

Dear Byron:

In your Per Curiam, 73-1347, Board of School Commissioner  
v. Jacobs, please note that I dissent.

William O. Douglas

Mr. Justice White

cc: The Conference

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Mr. Chief Justice  
Mr. Justice Black  
Mr. Justice Brennan  
Mr. Justice Burger  
Mr. Justice Douglas  
Mr. Justice Goldwater  
Mr. Justice Harlan  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1347

Circulate:

Recirculate:

The Board of School Com-  
missioners of the City  
of Indianapolis et  
al., Petitioners,  
v.  
Jeff Jacobs et al.

On Writ of Certiorari to the  
United States Court of  
Appeals for the Seventh  
Circuit.

[January —, 1975]

MR. JUSTICE DOUGLAS, dissenting.

In *Sosna v. Iowa*, — U. S. — (1975), we found no mootness problem where a named plaintiff belatedly satisfied the durational residency requirement which she had initially sought to attack. Our holding to that effect was based upon three factors which we found present in that case: (1) a certification of the suit as a class action; (2) a continuing injury suffered by other members of the class; and (3) a time factor which made it highly probable that any single individual would find his claim inevitably mooted before the full course of litigation had been run. Applying those principles to the present case, I would hold that an Art. III controversy exists and that the parties are therefore entitled to a ruling on the merits.

This suit was instituted as a class action on behalf of all high school students attending Indianapolis public schools. The record does not contain any written order formally certifying the class, but the absence of such a written order is too slender a reed to support a holding of mootness, particularly in the face of the incontrovertible evidence that certification was intended and did, in fact, take place. At the close of the second day of the proceedings on plaintiffs' application for a temporary restrain-

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

January 8, 1975

RE: No. 73-1347 The Board of School Commissioners  
of The City of Indianapolis v. Jacobs

Dear Byron:

I agree that we should vacate and remand to  
the District Court to consider mootness.

Sincerely,

*Bill*

Mr. Justice White  
cc: The Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

January 17, 1975

RE: No. 73-1347 Board of School Commissioners of the City  
of Indianapolis, et al. v. Jeff Jacobs, et al.

Dear Byron:

I agree with the Per Curiam you have prepared in the  
above.

Sincerely,

*Bill*

Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

January 21, 1975

RE: No. 73-1347 Board of School Commissioners v.  
Jacobs

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Dear Byron:

Please join me in the Per Curiam you have prepared in the above.

Sincerely,

*BW*

Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

December 17, 1974

MEMORANDUM TO THE CONFERENCE

Re: 73-1347, School Commissioners of Indianapolis v. Jacobs

At oral argument in this case it was asserted not only that the named plaintiffs had graduated from the Indianapolis High Schools but also that there are at present no students who desire to publish and distribute the "Corn Cob Curtain," [CCC] in these schools. Accepting these assertions as true, I think the case is moot. I do not think that the proposed opinion of the Court in Sosna v. Iowa, in which I have joined, indicates anything to the contrary.

Here, in an action considered by the District Judge and by the Court of Appeals to be a class action, the plaintiffs sought to enjoin the School Board Commissioners from suppressing the publication and distribution of the CCC. All of the named plaintiffs having graduated, I do not believe any position can sensibly be maintained but that the case is moot as to them. The question is whether, because of the "class action" nature of the case, an actual and justiciable controversy still exists between the School Board and the class of students whom the named plaintiffs sought to represent. I take the proposed opinion of the Court in Sosna to hold: When a class action has become moot as to the named plaintiff(s), this does not defeat Article III jurisdiction so long as (1) the class or persons represented has been certified, (2) a live controversy still exists between the defendant(s) and the remaining class members, and (3) that controversy is "capable of repetition" as to remaining class members but is of such nature that it will be likely to "evade review" unless jurisdiction is preserved.

The record does not disclose that the District Judge ever in fact certified by order that the action was to be maintained as a class action. See Fed. R. Civ. P. 23 (c) (1). If the case has never been certified as such, it must be considered moot under our precedents and under Sosna, and there is no need even to consider the remaining two Sosna criteria.

Accordingly, I would vacate the judgment in this case and remand it to the District Court with directions to vacate its judgment and dismiss the complaint as moot à la Munsingwear.

P. S.

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Supreme Court of the United States  
Washington, D. C. 20543

✓

CHAMBERS OF  
JUSTICE POTTER STEWART

January 8, 1975

Re: No. 73-1347, The Board of School Commissioners of Indianapolis v. Jacobs

Dear Byron,

Perhaps the alternative suggestions contained in your memorandum can be discussed at the Conference on Friday. I would be particularly interested in the views of Bill Rehnquist, as the author of the Sosna opinion.

Sincerely yours,

281

Mr. Justice White

Copies to the Conference

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Supreme Court of the United States  
Washington, D. C. 20543

✓

CHAMBERS OF  
JUSTICE POTTER STEWART

January 20, 1975

No. 73-1347, Indianapolis School Comm'rs  
v. Jacobs

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Dear Byron,

I agree with the proposed Per  
Curiam you circulated on January 17.

Sincerely yours,

P.S.  
✓

Mr. Justice White

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 16, 1974

Re: No. 73-1347 - Board of School Comm'rs v.  
Jacobs

Dear Chief:

I am changing my vote to dismiss as moot.  
That assumes a case or controversy about the  
school board's latest rules. I might be per-  
suaded that there was not.

Sincerely,



The Chief Justice

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 7, 1975

MEMORANDUM FOR THE CONFERENCE

Re: No. 73-1347 - The Board of School Commissioners of  
The City of Indianapolis v. Jacobs

The complaint in this case was filed on June 1, 1972, in the District Court, seeking declaratory and injunctive relief against the operation of certain rules promulgated by petitioners and enforced by high school officials which had resulted in the banning from distribution on school grounds of a student-written and produced newspaper entitled the "Corn Cob Curtain." At the time the complaint was filed, there were six named plaintiffs to the action, three of whom were then enrolled at either Arsenal Technical High School or Thomas Carr Howe High School in Indianapolis. Each of the other three named plaintiffs had graduated from either the Arsenal or Howe schools some five months prior to the filing of this action. All of the six students allegedly had collaborated in the production and distribution of the "Corn Cob Curtain." The complaint sought three distinct types of relief: (1) for the named plaintiffs and the class they sought to represent, declaratory and injunctive relief against



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 9, 1975

MEMORANDUM TO THE CONFERENCE

Re: No. 73-1347 - Bd of School Commissioners of  
Indianapolis v. Jacobs

Bill Rehnquist has pointed out that under the Sosna opinion, if mootness is to be avoided under the circumstances in that case, there must have been not only adequate certification of a class action but also an issue that would be recurring but evade review. My memorandum of yesterday should have, but did not, deal with this issue. It seemed to me that this was clearly one of those cases that would satisfy Sosna in this respect. Perhaps I am wrong.

  
B.R.W.

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
~~Mr. Justice Harlan~~  
Mr. Justice Black  
Mr. Justice Powell  
Mr. Justice Rehnquist

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 1-17-75

Recirculated: \_\_\_\_\_

No. 73-1347

The Board of School Com- missioners of the City of Indianapolis et al., Petitioners, v. Jeff Jacobs et al.	} On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.
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[January —, 1975]

PER CURIAM.

This action was brought in the District Court by six named plaintiffs to have declared unconstitutional certain regulations and rules promulgated by the petitioner and to have the enforcement of those regulations and rules enjoined, as well as seeking other relief no longer relevant to this case.\* In the complaint, the named plaintiffs stated that the action was brought as a class action pursuant to Rule 23 (a) and (b)(2) of the Federal Rules of Civil Procedure, and further stated that "[p]laintiff class members are all high school students attending schools managed, controlled, and maintained by the Board of School Commissioners of the City of Indianapolis." At the time this action was brought, plaintiffs were or had been involved in the publication and distribution of a student newspaper, and they alleged that certain actions taken by petitioner or its subordi-

\*The named plaintiffs sought expungement from their respective records of certain information and compensatory and punitive damages against petitioner. These prayers for relief were denied by the District Court for failure of proof and no appeal was taken from this decision.

STYLISTIC CHANGES THROUGHOUT.

~~SEE PAGES:~~

To: The Chief Justice  
✓ Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

2nd DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: \_\_\_\_\_

Recirculated: 2-3-75

No. 73-1347

The Board of School Com- missioners of the City of Indianapolis et al., Petitioners, v. Jeff Jacobs et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.
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[February —, 1975]

PER CURIAM.

This action was brought in the District Court by six named plaintiffs to have declared unconstitutional certain regulations and rules promulgated by the petitioner and to have the enforcement of those regulations and rules enjoined, as well as seeking other relief no longer relevant to this case.\* In the complaint, the named plaintiffs stated that the action was brought as a class action pursuant to Rule 23 (a) and (b) (2) of the Federal Rules of Civil Procedure, and further stated that "[p]laintiff class members are all high school students attending schools managed, controlled, and maintained by the Board of School Commissioners of the City of Indianapolis." At the time this action was brought, plaintiffs were or had been involved in the publication and distribution of a student newspaper, and they alleged that certain actions taken by petitioner or its subordi-

\*The named plaintiffs sought expungement from their respective records of certain information and compensatory and punitive damages against petitioner. These prayers for relief were denied by the District Court for failure of proof and no appeal was taken from this decision.

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Wm.  
Long  
Oct 1974

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 30, 1975

Re: No. 73-1347 -- The Board of School Commissioners  
of the City of Indianapolis et al. v. Jeff Jacobs

Dear Byron:

I agree with your Per Curiam.

Sincerely,

  
T.M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

January 9, 1975

MEMORANDUM TO THE CONFERENCE

Re: No. 73-1347 - Indianapolis Board of School  
Commissioners v. Jacobs

I, too, am inclined to the alternative suggested by Byron (as I believe Bill Brennan and Bill Rehnquist are) of vacating and directing a remand to the district court to determine whether the case has become moot and, if so, to dismiss the complaint. This, I suppose, is essentially the Burney treatment (409 U.S. 540).

Sincerely,



✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

January 21, 1975

Re: No. 73-1347 - Board of School Commissioners  
v. Jacobs

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Dear Byron:

Please join me in the per curiam you have proposed.

Sincerely,

*Harry*

Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

December 17, 1974

No. 73-1347 School Commissioners of  
Indianapolis v. Jacobs

MEMORANDUM TO THE CONFERENCE:

I concur in Potter's suggested disposition of the above case, namely, vacate and remand to the District Court with directions that its judgment be vacated and the complaint dismissed.

This was my first choice of a disposition.

*L.F.P.*  
L.F.P., Jr.

SS

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

January 20, 1975

No. 73-1347 Board of Commissioners  
v. Jacobs

Dear Byron:

Please join me in your Per Curiam.

Sincerely,

*Lewis*

Mr. Justice White

lfp/ss

cc: The Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

December 17, 1974

MEMORANDUM TO THE CONFERENCE

Re: No. 73-1347 - School Commissioners of Indianapolis v.  
Jacobs

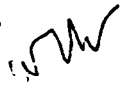
I am in substantial agreement with Potter's suggestion that the case is moot; the remaining comments in this memorandum may stem only from a parent's overly protective feeling about an unborn child (hopefully in the third trimester), namely Sosna.

I would think that if the determination of mootness in Jacobs were to be based on the failure of the District Court to certify the action pursuant to Fed. R. Civ. P. 23 (c)(1), it would be enough to say that the named plaintiffs had graduated, and unnecessary to go further and say that there are at present no students who desire to publish and distribute the CCC. My present understanding of the record in Jacobs is that while there was an allegation in the complaint as to the propriety of a class action, there was no corresponding prayer in the complaint and there was never a motion for certification; I would be quite willing to say that in the absence of either one of these forms of request that the failure of the District Court to certify was conclusive of the absence of class status under Sosna. But if I am wrong about my present understanding of the record, and there was either a prayer for certification, or a motion to certify, then I

do not think the simple failure of the District Court to accede to that request in haec verba should invariably prove fatal to a plaintiff in such a situation.

If one were to put the determination of mootness in this case, not on the basis of failure to certify, but on the basis that even assuming there had been certification, there are no conceivable members of the class remaining, the statement at oral argument referred to in the first paragraph of Potter's memorandum of December 17th would go a long way toward supporting such a disposition. I have a little doubt as to whether we ought to let such a statement at oral argument standing alone conclude us, and if the total absence of any conceivable members of a class, rather than failure to certify, is to be the basis of our disposition, I would think something might be said for vacating and remanding for consideration of mootness as we did in Indiana Employment Security Division v. Burney, 409 U.S. 450 (1973), cited in footnote 12 of Sosna.

Sincerely,



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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

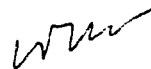
January 20, 1975

No. 73-1347 - Board of Commissioners v. Jacobs

Dear Byron:

Please join me in your Per Curiam.

Sincerely,



Mr. Justice White

cc: The Conference

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Washington, D. C. 20543

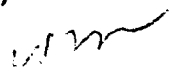
CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

January 21, 1975

Re: No. 73-1347 - Board of School Commissioners v. Jacob

Dear Byron:

Please join me.

Sincerely,  


Mr. Justice White

Copies to the Conference